UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-11960-GAO

RASHID HASAN,
Petitioner,

v.

SALINA HASAN,
Respondent.

FINDINGS, RULINGS AND ORDER
January 13, 2004

O'TOOLE, D.J.

The petitioner brought this action for the return of the parties' minor children pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Convention") and the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (1988) ("ICARA"). The matter was tried to the Court sitting without a jury. Upon consideration of the evidence and the briefs and arguments of the parties, the Court makes the following findings of fact and rulings of law:

FINDINGS OF FACT

The petitioner, Rashid Hasan ("Rashid"), and the respondent, Salina Hasan ("Salina"), were married in Pakistan on September 19, 1995. Roughly a month after they were married, the couple moved to Toronto, Canada, where they both lived until Salina left and came to the United States in about May, 2003. The couple have two children: a son, S.H., born October 8, 1996, and a daughter, M.H., born January 26, 1999. Both children were born in Toronto and lived there until May of 2003. When he became old enough, S.H. attended school in Toronto.

At some point, at least by the beginning of 2002, the couple began to experience marital difficulties. The parties offer conflicting testimony regarding various confrontations that occurred during their marriage. Salina alleges that Rashid verbally and physically abused her in front of the children. Rashid denies these allegations. Salina and Rashid were the only witnesses to testify at trial. Having had the opportunity to observe the parties as they testified, I find Rashid's testimony generally the more credible, though I do not credit his testimony in its entirety. For present purposes it is sufficient to state my finding that the parties got into a number of arguments during their marriage, some of which were witnessed by the children. There is no evidence that Rashid abused the children directly, physically or emotionally, in any way. There was evidence, which I credit, that Rashid has a very strong affection for his son. In fact, in evidence was a letter written by Salina to Rashid during a period of their separation in which she suggests that S.H. should be living with his father. There was no specific evidence concerning Rashid's relationship to his daughter.

There was also evidence that Salina has suffered from and been treated for psychiatric disorders. The evidence included notes of treatment of her by a Dr. Ali, a psychiatrist at the Royal Victoria Hospital of Barrie, Ontario, during 2002. The psychiatrist treated her with anti-psychotic medication for symptoms that apparently included paranoia and hallucinations.[1] For example, in a February 2002 note, Dr. Ali recorded that Salina thought someone was stalking her and that limousines were following her. It is not clear whether the notes produced from the Royal Victoria Hospital described all the visits Salina had with Dr. Ali. What is significant, especially to my credibility assessment of the witnesses, is that at trial, Salina denied ever seeing Dr. Ali at all for

[1] The fact of treatment is confirmed by contemporaneous pharmacy receipts indicating that Salina obtained prescriptions for the medicines that are mentioned in Dr. Ali's notes as being prescribed for her.

treatment on a doctor-patient basis. Her claim was that she had met him socially, so that what he wrote in the notes that are part of the medical records of the Hospital he derived from social contact, rather than from professional encounters. I find that claim incredible, and her refusal to acknowledge the visits with Dr. Ali as a patient leads me to view with considerable skepticism the rest of her testimony.

The course of the parties' relationship over the months preceding Salina's departure from Canada to the United States can be briefly summarized. The parties separated on August 12, 2002, following an argument. Rashid went to stay at a relative's house in Ontario. Salina obtained an ex parte order from the Ontario Court of Justice granting her custody of the children and further granting a restraining order against Rashid. On September 7, 2002, the Ontario court granted Rashid access to the children for alternate weekend overnight stays. On October 14, 2002, Salina wrote the letter to Rashid previously referred to indicating that she thought it would be best for S.H. to stay with him. In an affidavit dated October 22, 2002, and filed in the Ontario court, Salina indicated that her relationship with Rashid had de-escalated and that she no longer feared for her personal safety and security when in his presence. On November 8, 2002, the parties appeared in the Ontario Court of Justice, each represented by counsel, and the court entered a final custody order with the parties' consent. The order granted custody of both children to Rashid, granted Salina liberal and generous access to the children, and dismissed the restraining order against Rashid. The children remained in Rashid's physical and legal custody in Ontario from November 8, 2002 until May 17, 2003.

On May 17, 2003, the parties got into an argument at Rashid's sister's house. Salina called the police and reported that she was being assaulted. The police responded and Rashid was arrested and charged with assault. After spending that night in jail, Rashid returned to his sister's house to

find Salina and the children missing. Salina left Canada for the United States with the children on or about May 22, 2003. Salina and the children lived a short while with Salina's sister, then a cousin, until she was able to secure a job and an apartment in Massachusetts.

Unaware that Salina had left Canada with the children and unable to locate them, Rashid returned to the Ontario Court of Justice on June 5, 2003 and obtained an ex parte order enforcing the court's November 8, 2002 final custody order. In the June 5 order, the court directed law enforcement personnel to locate, apprehend and deliver the children to Rashid. Rashid returned to the court three more times on June 30, 2003, July 23, 2003 and August 14, 2003 to obtain further assistance in locating the children and enforcing the custody order, but both he and law enforcement were unsuccessful in locating the children. A few months later, with the assistance of the National Center for Missing and Exploited Children, Rashid was able to locate S.H. and M.H. living with their mother in Brookline, Massachusetts. On October 8, 2003, Rashid filed the present petition for return of the children pursuant to the Convention and ICARA.

CONCLUSIONS OF LAW

Under ICARA, a petitioner seeking the return of a child must establish by a preponderance of the evidence that the child has been wrongfully removed or retained within the meaning of the Convention. 42 U.S.C. § 11603(e)(1) (1995). Under Article 3 of the Convention, removal or retention of a child is wrongful where:

> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,498 (Mar. 26, 1986). The Court must first determine whether there has been a removal or

retention before any inquiry can be made into whether such removal or retention was wrongful. Toren v. Toren, 191 F.3d 23, 27 (1st Cir. 1999).

The parties do not dispute, and the evidence convincingly shows, that S.H. and M.H. were removed from their habitual residence[2] in Canada by their mother on or about May 22, 2003. The removal was wrongful within the meaning of the Convention. The final custody order of the Ontario Court of Justice, dated November 8, 2002, had given Rashid custody of S.H. and M.H. From November 8, 2002 until May 17, 2003, Rashid was exercising both physical and legal custody over the children. Five days after the incident on May 17, 2003, Salina removed the children from Canada to the United States in breach of the rights of custody attributed to Rashid.

Because the petitioner has demonstrated by a preponderance of the evidence that the children were wrongfully removed, the Court must order the children's return to Rashid's custody in Canada, unless the respondent is able to demonstrate by clear and convincing evidence that one of four narrow exceptions under the Convention applies. 42 U.S.C. § 11601(a)(4) (1995); Whallon v. Lynn, 230 F.3d 450, 454 (1st Cir. 2000).

The only exception argued for by the respondent in this case is that, pursuant to Article 13 of the Convention, the children should not be returned to Canada in their father's custody because there is a grave risk that return would expose them to physical or emotional harm or otherwise place them in an intolerable situation. Hague International Child Abduction Convention: Text and Legal

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[2] "[A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective . . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there." Zuker v. Andrews, 181 F.3d 81 (unpublished table decision), 1999 WL 525936, at *1 (1st Cir. Apr. 9, 1999) (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995)). S.H. and M.H. resided in Ontario, Canada from their date of birth until they were removed by Salina on or about May 22, 2003.

Analysis, 51 Fed. Reg. 10,499, 10,510. The Court is obliged to make subsidiary factual findings needed to determine the nature and extent of any risk asserted as a defense to returning the children. Danaipour v. McLarey, 286 F.3d 1, 15 (1st Cir. 2002). "Only evidence directly establishing the existence of a grave risk that would expose the child[ren] to physical or emotional harm or otherwise place the child[ren] in an intolerable situation is material to the court's determination." Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,510. "Grave" means more than a serious risk. Danaipour, 286 F.3d at 14; Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000). Thus, the primary focus of the Court's determination is on the effect on the children and whether they would be exposed to a grave risk of harm or an intolerable situation upon return to Canada.

Salina contends that there is a grave risk of physical or emotional harm to the children if they are returned to Canada with their father because during their marriage Rashid was verbally and physically abusive to Salina in front of the children. There is no credible evidence that Rashid was verbally or physically abusive to the children directly. Quite the contrary, the evidence shows that Rashid cares deeply for his children and there is nothing to suggest that he would harm them in any way. That is not to say that children do not suffer harm from witnessing altercations between their mother and father. See e.g., Walsh, 221 F.3d at 220. In some cases incidents of spousal abuse may present a grave risk of physical or psychological harm to children involved. Id. But there is no credible evidence in this case to show that S.H. and M.H. would suffer grave risk if returned to Canada. Moreover, Salina and Rashid, though still married, are separated and are not living together, and the June 5, 2003 order from the Ontario Court of Justice bars Salina from having access to the children and from coming within 100 meters of Rashid's home. Therefore, the children are not likely to be exposed to the kinds of confrontations between their parents which Salina

contends give rise to a grave risk of harm to the children.

Lastly, Salina argues that a guardian ad litem should be designated to determine the best interests of the children. However, "[t]he Article 13(b) defense may not be used 'as a vehicle to litigate (or relitigate) the child's best interests.'" Danaipour, 286 F.3d at 14 (quoting Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,510). "The Convention is generally intended to restore the pre-removal status quo and discourage a parent from crossing international borders in search of a more sympathetic forum." Whallon, 230 F.3d at 455. It would be inappropriate for this Court to litigate the best interests of the children or decide the merits of any underlying custody dispute. The Ontario Court of Justice is the proper forum for those determinations.

COSTS AND ATTORNEY'S FEES

The petitioner has moved for an order requiring the respondent to pay his legal fees, court costs, transportation costs related to the return of the children, and lodging costs incurred in prosecuting this action. Section 11607(b) of ICARA provides, in pertinent part:

> (3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

42 U.S.C. § 11607(b)(3) (1995). Congress intended this section to provide an additional deterrent to wrongful international child removals and retentions. H.R. Rep. No. 100-525, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 386, 395. An award of the enumerated costs and fees is made mandatory by the plain language of the statute. The statute reflects the provisions of the last paragraph of Article 26 of the Convention. Id. Article 26 lists the possible recoverable expenses as "travel expenses, any costs incurred or payments made for locating the child[ren], the costs of

legal representation of the applicant, and those of returning the child[ren]." Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,500. While § 11607 does not specifically allow for lodging costs incurred in prosecuting this action, it appears that such costs are contemplated by Article 26. Such costs might also be considered "transportation costs related to the return of the child." 42 U.S.C. § 11607(b)(3) (1995). The Court interprets this section of the statute broadly to better serve its deterrent purpose. See Holloway v. United States, 526 U.S. 1, 9 (1999). The respondent did not file an opposition to the petitioner's motion and does not present any argument as to why an award of the petitioner's expenses would be clearly inappropriate.

CONCLUSION

The Court finds that the respondent wrongfully removed the minor children from their habitual residence in breach of rights of custody attributed to the petitioner by the Ontario Court of Justice, which rights were actually being exercised at the time of removal. Furthermore, the respondent has not demonstrated that one of the exceptions under the Convention applies in this case. Accordingly, the petition for return of the children is GRANTED.

The respondent is ORDERED to appear personally in this Court, Courtroom 9, 3rd Floor, on **January 23, 2004, at 2:00 p.m.**, with the minor children, S.H. and M.H., in order to return the children to the custody of the petitioner for their return to Canada. The respondent shall not remove the two minor children from the District of Massachusetts pending their appearance in this Court on the above date.

In addition, the petitioner is ORDERED to submit within fourteen days of the date of this order a detailed application for court costs, legal fees, transportation costs related to the return of the children to Canada, and lodging costs incurred in prosecuting this action.

It is SO ORDERED.

January 13, 2004
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE